Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 86-71)

Customs Regulations Amendment Relating to the Customs Field Organization—Roberts Landing, Michigan

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Closing of Customs station.

SUMMARY: This document closes the Roberts Landing, Michigan, Customs station. Given the small volume of traffic crossing the Canadian-U.S. border at this point, and its proximity to other Customs stations, we believe the closure is warranted and in the public interest. This change will enable Customs and the Immigration and Naturalization Service to obtain more efficient use of their personnel, facilities, and resources, as well as realize a substantial annual savings.

EFFECTIVE DATE: May 1, 1986.

FOR FURTHER INFORMATION CONTACT: Bernie Harris, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

Customs ports of entry and stations are locations where Customs officers are placed for the purpose of accepting the entry of merchandise, collecting duties, examining baggage, clearing passengers, and enforcing the various provisions of the customs laws and other laws.

The significant difference between ports of entry and stations is that at stations, the Federal Government is reimbursed for:

(1) The salaries and expenses of its officers or employees for services rendered in connection with the entry or clearance of vessels; and

(2) Except as otherwise provided by the Customs Regulations, the expenses (including any per diem allowed in lieu of subsistence), but not the salaries of its officers or employees, for service rendered in connection with the entry or delivery of merchandise.

As part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to importers, carriers, and the public, by a document published in the FEDERAL REGISTER on October 17, 1985 (50 FR 42036), Customs proposed to amend § 101.4(c), Customs Regulations (19 CFR 101.4(c)), by deleting Roberts Landing, Michigan, from the list of designated Customs stations.

The Roberts Landing Customs station, located in the Detroit, Michigan, Customs district, is one of three auto ferry stations on the St. Clair River between the Customs ports of Port Huron and Detroit. Roberts Landing is a river crossing only; there is no town or village on the U.S. side of the river. Customs has determined that it is not cost-effective to maintain this station in view of the following factors: Its traffic is almost exclusively non-commercial; the ferry boat at the landing is too small to transport any vehicle larger than a medium size camper; the station is closed each year for a period of from 2 weeks to 4 months due to various reasons (vessel repairs, weather, river ice, etc.); the other two ferry stations on the St. Clair River (Algonac, which is 3 miles south; and Marine City, which is 5 miles north) are so close to Roberts Landing that minimal inconvenience will be caused to diverted traffic, and these other two stations could easily handle any overflow without incurring any increase in their operating costs. The Immigration and Naturalization Service has decided not to fill their vacant Inspector position located there. Closing Roberts Landing would enable Customs to realize a savings of over $100,000 annually.

DISCUSSION OF COMMENTS

Twenty-four comments were received in response to the notice, all opposed. The comments came from both Canadian residents and U.S. residents. There were two basic reasons expressed by the commenters for disapproving the closing; the negative economic impact resulting from the loss of tourism on both sides of the border, and the personal inconvenience to area Canadian and U.S. residents. Although we appreciate the concerns of the commenters, they do not mitigate the Congressional mandate to make more efficient use of our personnel, facilities, and resources. The fact remains that Roberts Landing is one of three auto ferry stations within an eight mile stretch of border. The close proximity of the stations at Algonac and Marine City minimizes any inconvenience occasioned by the closing of Roberts Landing. Customs can save more than $100,000 annually at a station where there is virtually no commercial traffic. Thus, the closing the Roberts Landing is warranted. Ac-

cordingly, the list of Customs districts, stations, and ports of entry having supervision, in § 101.4(c) is amended to reflect this change.

LISTS OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Imports, Organization.

AMENDMENTS TO THE REGULATIONS

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101, Customs Regulations (19 CFR Part 101), continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624, Reorganization Plan 1 of 1965, 3 CFR 1965 Supp.

2. The list of Customs districts, stations, and ports of entry having supervision, in § 101.4(c) is amended as follows:

By removing "Roberts Landing, Mich (Mail: Route 1, Aloonac, Mich.)." from the column headed "Customs stations" and by removing "Port Huron" from the column headed "Port of entry having supervision" in the Detroit, Michigan, Customs district.

EXECUTIVE ORDER 12291

Because the amendment relates to the organization of Customs it is not a regulation or rule subject to E.O. 12291, pursuant to § 1(a)(3) of that E.O.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of § 3 of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601, *et seq.*), it is hereby certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: March 14, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 1, 1986 (51 FR 11013)]

19 CFR Part 6

(T.D. 86-72)

Customs Regulations Amendments Relating to Overflight Exemptions and Reporting Requirements for Aircraft Arriving in the U.S.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by expanding the requirements for pilots to report notice of penetration of U.S. airspace, and by placing additional requirements upon those who seek an exemption from the landing requirements for aircraft arriving from areas south of the U.S.

Current regulations provide specifics regarding the requirements for reporting arrival, and include a list of designated airports at various border and coastline points at which designated aircraft must land. These amendments expand the coverage of existing requirements to: Include some flights arriving from Puerto Rico and all flights arriving from the U.S. Virgin Islands within the notice of penetration requirements; increase from 15 minutes to 1 hour the minimum time required for notice to be given prior to penetrating U.S. airspace; and require aircraft seeking exemptions from certain landing requirements to be equipped with functioning transponders and to provide additional justification for being granted an exemption.

The amendments are necessary because of the severity of the drug abuse problem, the major increase in illegal drug importations by use of aircraft, and the need for action to expand the effectiveness of drug smuggling enforcement. Customs has found that because aircraft arriving in U.S. airspace from certain areas south of the mainland U.S. are exempt from current reporting requirements, and because overflight exemption requirements are too lax, certain potentially high-risk flights are able to bypass the best drug interdiction efforts of Customs. These amendments seek to remedy that situation.

EFFECTIVE DATE: April 30, 1986.

FOR FURTHER INFORMATION CONTACT:

Operational aspects: Thomas Hargrove, Office of Inspection and Control, (202-566-5607).

Legal aspects: John A. Mathis, Carrier Rulings Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, (202-566-5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The National Narcotics Intelligence Consumers Committee has documented that the supply of illegal drugs to the U.S. market and the subsequent extent of drug abuse has reached monumental proportions. Illegal drug use increased an estimated 15 percent in the U.S. in 1984, according to the Committee. The severity of the drug abuse problem, the preponderance of drug users, and the major increases in volumes of illegal drug importations in the U.S. are indicated by the significant increase in drug-related deaths, medical care, arrests, and seizures.

The smuggler organization has solidified a dominant position in the U.S. through the penetration of strategic points in the economy. Areas to the south of the U.S. are major sources of illegal drugs destined for the U.S. Smuggling by air is the preferred mode of transportation for high-cost narcotics, with cocaine and marijuana smuggling representing particularly high risk areas. A Stanford Research Institute Study (not associated with Stanford University) indicates that magnitude of the air smuggling threat at approximately 6,700 flights, annually. Although recent air interdiction activities in the southeastern U.S. have resulted in many arrests and seizures, an end to the prevalence of drug abuse in the U.S. is not in sight.

To address this national problem, it is necessary to take action to expand the effectiveness of smuggling enforcement. In 1975, the Customs Regulations were amended by adding a new § 6.14 (19 CFR 6.14), to provide for a notice of intended arrival for private aircraft arriving in the U.S. via the U.S./Mexican Border.

Because of the magnitude of the drug problem, and in direct response to Executive and Congressional directives, by an interim regulation published as T.D. 82-52 in the Federal Register on March 24, 1982 (47 FR 12620), the notice requirements were extended to private aircraft arriving in the U.S. via the Gulf of Mexico, Pacific, and Atlantic Coasts. These interim regulations were adopted as a final rule by publication of T.D. 83-192 in the Federal Register on September 15, 1983 (48 FR 41381).

By publication of T.D. 84-236 in the Federal Register on November 29, 1984 (49 FR 46885), § 6.14 was further amended to extend the reporting requirements to certain commercial aircraft arriving from areas south of the U.S. By expanding the definition of private aircraft to include certain commercial flights, Customs sought to increase enforcement coverage to further stem the flow of illicit narcotics. In spite of previous efforts, we have found that there

remain certain gaps in the reporting requirements provided in Part 6, Customs Regulations (19 CFR Part 6).

Accordingly, by notice published in the Federal Register on April 1, 1985 (50 FR 12819), it was proposed to further amend Part 6, Customs Regulations, to enhance enforcement capabilities. The major thrust of the proposal was to extend the minimum advance notice of U.S. airspace penetration requirement from 15 minutes to 1 hour, to include aircraft arriving from the U.S. Virgin Islands and Puerto Rico in the notice requirements, to require aircraft pilots seeking exemption from the requirements to land at a designated airport, to require pilots to certify the aircraft to be equipped with a functioning transponder (to be activated during overflight), and to provide detailed reasons for the exemption request.

Based in part on our consideration of the comments received in response to the notice, we have decided to make some minor changes to the amendments as initially proposed. These include moving the definition of "Place" from § 6.1 to § 6.14, excluding from the advance notice requirements some flights from Puerto Rico (as explained later in this document), and including the boundaries of the Air Defense Identification Zone as the point beyond which advance reports of airspace penetration must be made.

Analysis of Comments

Eight comments were received in response to the April 1, 1985, Federal Register notice. Of these, two expressed wholesale support for the proposal, five were critical of at least some elements, and one offered general comments and suggestions for further amendments.

In addition to the amendments proposed to § 6.14, it was also proposed to amend § 6.1 by adding a definition of "place" to mean anywhere outside of U.S. airspace. Two commenters state that placement of the definition in § 6.1 is incorrect and could be confusing as concerns other sections within Part 6. It is stated that what is needed is more concise definition of "place", and that, to avoid confusion, the definition should appear in § 6.14 itself.

We agree. Accordingly, instead of amendment § 6.1, the definition is being added to § 6.14(e). The definition has also been altered to conform to the boundaries of the U.S. military Air Defense Identification Zone (ADIZ). This should eliminate all confusion since the boundaries of the ADIZ are well known to pilots.

One commenter expressed concern over the inclusion of Puerto Rico as a location from which aircraft must provide advance notice of U.S. airspace penetration.

We have reconsidered this matter and have determined that the advance notice requirement will not be necessary for flights from Puerto Rico which are conducting flight by Instrument Flight Rules (IFR). It is our understanding that nearly all flights between

Puerto Rico and the Continental U.S. are conducted under IFR and are, therefore, identifiable to Customs through liaison with the Federal Aviation Administration.

By far, the greatest amount of concern was expressed over the proposal to extend the required advance notice time limit from 15 minutes to no less than 1 hour prior to U.S. airspace penetration. The major objection raised is that inadequate communication facilities may exist in many of the more remote locations from which advance notice would be required.

We are aware that there may be some initial difficulties associated with the new rules. Customs personnel will work with members of the flying public to minimize any difficulties. Given the magnitude of the narcotics smuggling problems, however, any opportunity for making in-roads must be tried, potential problems notwithstanding. A 1-hour prior notification is not unique in the western hemisphere. Many of the locations from which extended prior notice would be required, themselves require 1-hour notice or even longer. Furthermore, the 1-hour time limit is a minimum. Customs will accept notification at any time longer than 1 hour, for example, at the time a pilot who intends to depart the U.S. files a flight plan with the FAA.

Executive Order 12291

This is not a "major rule" as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

Under the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that these amendments will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 requires that Customs must inform the public why it is collecting this information, how it will use it, and whether it must be given to Customs. Customs requires the information in order to carry out the laws and regulations which it administers. This regulation applies to private aircraft arriving in the U.S. via the U.S./Mexican border or the Atlantic, Pacific, and Gulf coasts, or any place in the Western Hemisphere south of 30 degrees north latitude, and it relates to the processing of the aircraft and its passengers. The information is used for arranging appropriate Customs services for arrival, inspection processing, and enhanced enforcement entry control for effective violator interdiction. The requirements are mandatory but the regulation provides a means for requesting an exemption from the landing requirements. The granting of the exemption is at the au-

thority of Customs. Pursuant to the Paperwork Reduction Act of 1980, the Office of Management and Budget has approved the collection of information requirements and assigned control number 1515–0098 to the reporting requirements contained in this document.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

Lists of Subjects in 19 CFR Part 6

Air carriers, Air transportation, Aircraft, Airports.

Amendments to the Regulations

Part 6, Customs Regulations (19 CFR Part 6), is amended as set forth below:

Part 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote. 11), 1624, 49 U.S.C. 1474, 1509:
§ 6.14 also issued under 49 U.S.C. 1372: § 6.25 also issued under 48 U.S.C. 1460(i).

2. The second sentence of § 6.14(a) is amended by removing the words "15 minutes", and inserting, in their place, the words "1 hour".

3. Section 6.14(b) is revised to read as follows:

§ 6.14 Private aircraft arriving from areas south of the U.S.

* * * * * * *

(b) *Advance report of penetration of U.S. airspace via Gulf and Atlantic Coasts.* All private aircraft arriving in the Continental U.S. via the Gulf of Mexico and Atlantic Coasts from a place in the western Hemisphere south of 30 degrees north latitude, from any place in Mexico, from the U.S. Virgin Islands, or (notwithstanding the definition of "United States" in § 6.1(b)) from Puerto Rico, which if from Puerto Rico, are conducting flight under visual flight rules (VFR), shall furnish a notice of intended arrival to Customs at the nearest designated airport to point of crossing listed in paragraph (g) of this section for the first landing in the U.S. The notice must be furnished at least 1 hour before crossing the U.S. coastline. The notice may be furnished directly to Customs by telephone, radio, or other means, or may be furnished through the Federal Aviation Administration to Customs. The requirements to furnish

a notice of intended arrival shall not apply to private aircraft departing from Puerto Rico and conducting flight under instrument flight rules (IFR) until crossing the U.S. coastline or proceeding north of 30 degrees north latitude.

4. Section 6.14(c)(5) is amended by removing the parenthetical word "(foreign)".

5. Section 6.14(c)(7) is revised to read as follows:

§ 6.14 Private aircraft arriving from south of the U.S.

* * * * * * *

(c) * * *

(7) Name of U.S. airport of first landing (designated airport listed in paragraph (g) of this section *nearest* to point of crossing unless an exemption has been granted in accordance with paragraph (f) of this section, or if the aircraft has not landed in foreign territory or is arriving direct from Puerto Rico, or if the aircraft was inspected by Customs officers in the U.S. Virgin Islands); and

6. Section 6.14(d) is revised to read as follows:

§ 6.14 Private aircraft arriving from south of the U.S.

* * * * * * *

(d) *Landing requirement.* Private aircraft required to furnish a notice of intended arrival in compliance with paragraphs (a), (b), and (c) of this section shall land for Customs processing at the *nearest* designated airport to the border or coastline crossing point as listed in paragraph (g) of this section, unless exempted from this requirement in accordancce with paragraph (f) of this section. In addition to the requirements of this paragraph, private aircraft commanders must comply with all other landing and notice of arrival requirements. This requirement shall not apply to private aircraft which have not landed in foreign territory or are arriving directly from Puerto Rico or if the aircraft was inspected by Customs officers in the U.S. Virgin Islands.

7. Section 6.14(e) is amended by removing the title *"Private aircraft defined".*, and by inserting, in its place, the title "Definitions", by designating the existing paragraph as § 6.14(e)(1), and by inserting a new paragraph thereafter designated as § 6.14(e)(2), to read as follows:

§ 6.14 Private aircraft arriving from areas south of the U.S.

* * * * * * *

(e) * * *

(2) The term "place" as used in this section means anywhere outside of the inner boundary of the Atlantic (Coastal) Air Defense Identification Zone (ADIZ) south of 30 degree north latitude, anywhere outside of the inner boundary of the Gulf of Mexico (Coastal) ADIZ, or anywhere outside of the inner boundary of the Pacific (Coastal) ADIZ south of 33 degrees north latitude.

8. Section 6.14(f)(1) (iii) and (xi), respectively, are revised to read as follows:

§ 6.14 Private aircraft arriving from areas south of the U.S.

* * * * * * *

(f) * * *

(iii) A statement that the aircraft is equipped with a functioning transponder which will be in use during overflight and that overflights will be made in accord with instrument flight rules (IFR);

* * * * * * *

(xi) Detailed reasons for overflight exemption, stated in terms of savings in cost and time, safety considerations, and convenience.

9. Section 6.25(c)(1) is amended by removing the words "which are not inspected by Customs officers in the Virgin Islands".

10. Section 6.25(c)(2) is amended by removing the words "which are not inspected by Customs officers in the Virgin Islands".

11. Section 6.25 is amended by removing paragraph (c)(3), and by redesignating paragraphs (c)(4) and (5) as paragraphs (c)(3) and (4), respectively.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 24, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 31, 1986 (51 FR 11004)]

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19 CFR Parts 18, 24, 112, 113, 141, 144, 146, 178, and 191

(T.D. 86-16)

Foreign Trade Zones; Specialized and General Provisions

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: This document corrects two errors in a document which amended the Customs Regulations relating to foreign trade zones by providing a new audit-inspection method of zone supervision by Customs. The document was published as T.D. 86-16 in the FEDERAL REGISTER on Tuesday, February 11, 1986 (51 FR 5040).

FOR FURTHER INFORMATION CONTACT: Marcus Sircus, Regulatory Audit Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202-566-2812).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In FR Doc. 86-2399, appearing at page 5040 in the issue of Tuesday, February 11, 1986, on page 5063, in the second column, under the heading "§ 24.13 [Amended]," the explanation of the amendment to § 24.13 is incorrectly worded. The correct explanation reads as follows:

§ 24.13 [Amended]

2. Section 24.13 is amended by inserting, in the first sentence of paragraph (c), the words "a foreign trade zone operator" before the words "and bonded warehouse proprietors", and by inserting, in the first sentence of paragraph (f), the words "foreign trade zone operator or" before the words "Customs bonded warehouse proprietor".

On page 5064, in the third column, under the heading **"§ 191.165 Same condition drawback merchandise and merchandise not conforming to sample or specifications or shipped without the consent of the consignee."**, the first paragraph, with the heading "Drawback entry", is incorrectly cited, parenthetically, as paragraph "(d)". The correct parenthetical citation should be paragraph "(b)".

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

Dated: March 27, 1986.

[Published in the Federal Register, April 1, 1986 (51 FR 11012)]

U.S. Court of Appeals for the Federal Circuit

(Appeal Nos. 85-2082, 85-2158)

ALSTHOM ATLANTIQUE AND COGENEL, INC., APPELLEES *v.* UNITED STATES, APPELLANT/CROSS-APPELLEE AND WESTINGHOUSE ELECTRIC CORP., APPELLANT

A. David Lafer, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellant United States. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General, *David M. Cohen,* Director and *Velta A. Melnbrences,* Assistant Director.

Richard O. Cunningham, Steptoe & Johnson, of Washington, D.C., argued for appellant Westinghouse. With him on the brief were *W. George Grandison, Kevin J. Brosch* and *Barbara A. Pollack.*

Joseph F. Donohue, Sr., Donohue & Donohue, of New York, New York, argued for appellees.

Appealed from: U.S. Court of International Trade.

Judge PAUL RAO.

(Appeal Nos. 85-2082, 85-2158)

ALSTHOM ATLANTIQUE AND COGENEL, INC., APPELLEES *v.* UNITED STATES, APPELLANT/CROSS-APPELLEE AND WESTINGHOUSE ELECTRIC CORP., APPELLANT

(Decided March 24, 1986)

Before MARKEY, *Chief Judge,* RICH and SMITH, *Circuit Judges.*

SMITH, *Circuit Judge.*

In this antidumping case, appellants, the United States and Westinghouse Electric Corporation, appeal from a Court of International Trade decision remanding an administrative determination by the International Trade Administration, Department of Commerce (ITA), and holding that the ITA, during its review pursuant to section 751 of the Trade Agreements Act of 1979, could change the scope of an antidumping finding made by the Department of the Treasury (Treasury). We reverse.

I. ISSUES

The principal question before this court is whether the lower court erred, as a matter of law, in not dismissing as untimely, the challenge of appellees Alsthom Atlantique and Cogenel, Inc. (Alsthom) to Treasury's antidumping determination with respect to large power transformers from France. We also address whether the lower court erred in holding that the ITA has the authority, during the course of a section 751 review, to change the scope of an underlying antidumping determination made by Treasury.

II. BACKGROUND

The lengthy chronology of events leading up to the current dispute began on March 11, 1970, when a petition was filed with the Treasury by Westinghouse Electric Corporation, requesting Treasury to initiate an antidumping investigation of large power transformers from France. The Westinghouse petition indicated a possibility that large power transformers from France were being, or were likely to be, sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended.[1] On June 17, 1970, an Antidumping Proceeding Notice issued by Treasury was published in the Federal Register announcing its plans to institute an inquiry to verify the information submitted by Westinghouse and to obtain the facts necessary to reach a determination as to the fact or likelihood of sales at less than fair value.[2] Treasury proceeded to conduct its inquiry, which included an investigation of Alsthom Savoisienne, the corporate predecessor of Alsthom Atlantique.

On June 11, 1971, Treasury, in response to questions concerning the scope of its antidumping investigation, issued instructions indicating that the Antidumping Proceeding Notice with respect to large power transformers from France was being amended to clarify Treasury's intent in the original notice.[3] These instructions stated that the Antidumping Proceeding Notice applied to "all types of transformers rated 10,000 KVA or above, * * * including but not limited to shunt reactors." Treasury's notice explicitly indicated that Treasury was investigating, and that its findings would apply to, all types of large power transformers including shunt reactors.

On October 21, 1971, Treasury published a "Withholding of Appraisement Notice" with regard to large power transformers from France.[4] This notice announced Treasury's determination that there were "reasonable grounds to believe or suspect that the purchase price * * * of large power transformers from France is less, or likely to be less, than the foreign market value." The notice further indicated that Treasury was directing Customs officers to

[1] 19 U.S.C. § 160 *et seq.*, *repealed by* Pub. L. No. 96-39, tit. I, § 106(a), 93 Stat. 193 (1979).
[2] 35 Fed. Reg. 9934 (1970).
[3] 36 Fed. Reg. 11,308 (1971).
[4] 36 Fed. Reg. 20,374 (1971).

withhold appraisement of large power transformers from France. On April 25, 1972, the United States Tariff Commission published its determination that an industry in the United States was being injured by less than fair value imports of large power transformers from France.[5] On June 14, 1972, Treasury published its finding of dumping with regard to large power transformers from France.[6] No further administrative action was taken with respect to large power transformers from France until after January 1, 1980.

The Trade Agreements Act of 1979 transferred the responsibility from the Customs Service to the ITA for determining the applicable antidumping duties.[7] The act also amended the Tariff Act of 1930 to provide for the annual review of "the amount of any antidumping duty." Pursuant to this authority, the ITA on March 28, 1980, published in the Federal Register a notice that it was conducting administrative review of 83 outstanding determinations of dumping.[8] On April 9, 1980, after the ITA announced its intent to conduct an administrative review and prior to its preliminary results of the review, Cogenel, Inc., Alsthom's subsidiary and United States importer of large power transformers from France produced by Alsthom, requested that the ITA "modify" the Treasury's antidumping finding by removing Alsthom Unelic (corporate successor to Alsthom Savoisienne, corporate predecessor to Alsthom Atlantique) from the finding on the basis of "changed circumstances" pursuant to 19 C.F.R. §§ 353.53–.54.[9]

On June 25, 1981, the ITA published a notice of "Preliminary Results of Administrative Review of Antidumping Finding" with regard to large power transformers from France.[10] Due to Alsthom's failure to provide specific information regarding the merchandise sold in its home market, the ITA preliminarily determined to postpone appraisement of entries and to establish a cash deposit rate based upon the best information available.

Following publication of the notice of the preliminary results of ITA's section 751 review, Alsthom requested a hearing to discuss whether shunt reactors were within the "class or kind of foreign merchandise" covered by Treasury's original antidumping order on large power transformers from France. The hearing was held on July 30, 1981. At the hearing, Alsthom asserted that shunt reactors were not subject to Treasury's antidumping order since there was never a valid finding that shunt reactors had been imported, had

[5] 37 Fed. Reg. 8136 (1972).
[6] 37 Fed. Reg. 11,772 (1972).
[7] Trade Agreements Act of 1979, 19 U.S.C. § 1675 (1982).
[8] 45 Fed. Reg. 20,511–12 (1980).
[9] Under § 353.53, whenever the Secretary of Commerce determines that sales of merchandise subject to an antidumping order are no longer being made at less than fair value, and that there is no likelihood of resumption of sale at less than fair value, he may act to revoke or terminate, in all or in part, such order. However, § 353.54 requires a firm applying for a revocation of a dumping finding to demonstrate to the ITA that sales of the merchandise are no longer made at less than fair value, and to satisfy the ITA that there is no likelihood of resumption of sales at less than fair value.
[10] 46 Fed. Reg. 32,928 (1981).

been sold at less than fair value, or had injured or threatened to injure an industry in the United States.

On March 10, 1982, the ITA published its notice of "Final Results of Administrative Review of Antidumping Finding" with regard to large power transformers from France.[11] The ITA determined that shunt reactors were clearly included in Treasury's antidumping finding, using the same language set forth by Treasury in the original Antidumping Proceeding Notice of June 11, 1971. The ITA held that the scope of the antidumping finding could not be changed during a section 751 administative review since it was clear that shunt reactors were included in the subject class or kind of merchandise, large power transformers, throughout the administrative proceeding. The ITA further ruled that not all elements of a class or kind of merchandise must be exported to the United States during the period of investigation in order for such elements to be within the scope of an antidumping finding order and that not all elements must be sold at less than fair value.

Alsthom brought action in the Court of International Trade pursuant to 19 U.S.C. § 1516(a)(2) and 28 U.S.C. § 1581(c) challenging ITA's section 751 final results of administrative review with respect to large power transformers from France. The lower court, relying on its decision in *Diversified Products Corp.* v. *United States*,[12] declared the action timely, accepting Alsthom's assertion that it was contesting ITA's section 751 review of Treasury's antidumping determination of large power transformers from France, and not the underlying Treasury determination itself. The lower court issued a memorandum opinion and order remanding the case to the ITA because, in the view of the lower court, the ITA had erred in its conclusion that it had no authority, in the context of a section 751 review, to alter the scope of the antidumping finding established by Treasury.[13] For the reasons set out below, we hold that the lower court erred both (1) in not dismissing Alsthom's appeal as untimely and (2) in determining that the ITA has authority, during a section 751 review, to alter the scope of an antidumping determination established by Treasury.

III. ANALYSIS

A. *Timeliness of Appeal.*

Judicial review of countervailing and antidumping duty determinations is governed by the Transitional Rules, section 1002(b)(3) of title X of the Trade Agreement of 1979.

> (3) CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY ASSESSMENTS.—The amendments made by this title shall apply with respect to the review of the assessment of, or

[11] 47 Fed. Reg. 10,268 (1982).
[12] *Diversified Products Corp.* v. *United States*, 572 F. Supp. 883 (Ct. Int'l Trade 1983).
[13] *Alsthom Atlantique* v. *United States*, 604 F. Supp. 1234 (Ct. Int'l Trade 1985).

> failure to assess, any countervailing duty or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

The Transitional Rules, in effect, set out guidelines indicating to the complainant the proper procedure he should follow in obtaining judicial review of an antidumping or countervailing duty determination.

Under the Transitional Rules, the complaint's initial inquiry is directed to whether the antidumping finding concerning the article in question was "made by the Secretary of the Treasury or the International Trade Commission before the effective date." If the antidumping finding was made after January 1, 1980, then irrespective of whether an assessment of antidumping duty was performed, the complainant may seek judicial review, pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c), of all section 751 administrative reviews within 30 days of the date they are published in the Federal Register. If, however, the antidumping finding was made prior to the effective date, then a further question must be addressed, namely, whether there has been an assessment of antidumping duty subject to the antidumping finding. If no assessment of such duty had been made before the effective date, then the Transitional Rules direct that review of the antidumping finding "shall be subject to review in accordance with the law in effect on the day before the effective date." Under such prior law, importers of the merchandise covered by Treasury's antidumping determination must wait until an entry of merchandise is liquidated, and then must protest that liquidation pursuant to 19 U.S.C. § 1514 (1976). Then, if that protest is denied as provided in 19 U.S.C. §1515 (1976), the importer may challenge that denial in the Court of International Trade pursuant to 28 U.S.C. § 1581(a).

Application of the guidelines set forth by the Transitional Rules to the present case directs our first inquiry to when the articles in question, shunt reactors, were subject to an antidumping funding. Treasury, from the outset, specifically included shunt reactors in the scope of its 1971 antidumping investigation of large power transformers from France. The Transitional Rules, therefore, direct our second inquiry to whether there has been an assessment of antidumping duty on shunt reactors prior to the effective date. Since no such assessment had been made, the Transitional Rules dictate the judicial review of the antidumping determination may only be obtained in accordance with the law in effect on the day

before the effective date. Therefore, we arrive at our conclusion that Alsthom's challenge was untimely and should have been made pursuant to 28 U.S.C. § 1581(a) only after exhausting the administrative procedures set forth by 19 U.S.C. §§ 1514–1515 (1976).

Alsthom attempted to challenge Treasury's inclusion of shunt reactors within the scope of its antidumping determination concerning large power transformers from France by bringing action in the Court of International Trade pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c). The lower court accepted Alsthom's appeal from the ITA relying on the previous Court of International Trade decision of *Diversified Products Corp.*[14] as authority. The lower court accepted Alsthom's position that Alsthom was contesting ITA's section 751 review of Treasury's antidumping determination, and not the underlying Treasury determination itself. However, as will be shown below, *Diversified Products* is distinguishable from the present case and it was error for the lower court to rely on it in accepting Alsthom's appeal of the ITA decision.

The history of the antidumping determination in *Diversified Products* began in 1971 when a complaint was filed with the Treasury by an intervenor requesting initiation of a dumping investigation of bicycle speedometers from Japan. In 1972, Treasury determined that bicycle speedometers from Japan were being sold at less than fair value. Shortly after enactment of the Trade Agreements Act of 1979, the ITA began its review of all prior dumping findings of the Treasury Department. This review included a determination whether double-gear hub drive speedometers, which had not yet been developed at the time of the 1972 dumping investigation, belonged to the class or kind of merchandise encompassed in the 1972 finding. During its section 751 review of the bicycle speedometer dumping determination, the ITA determined that double-gear hub speedometers were within the scope of the 1972 dumping finding. Diversified, pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c), appealed the ITA's determination to the Court of International Trade, contending that double-gear hub drive speedometers were beyond the scope of the 1972 antidumping determination. Although the underlying antidumping determination regarding bicycle speedometers from Japan was made by Treasury in 1972, the specific recognition of double-gear hub drive speedometers within the scope of Treasury's 1972 determination was not done until after the effective date.

The lower court mistakenly relied on *Diversified Products* as controlling in this case because of the following factual distinctions which, under the Transitional Rules, result in different procedural requirements for obtaining judicial review of antidumping or countervailing duty determinations. First in *Diversified Products,* the articles in question, double-gear hub drive speedometers, had not

[14] *Diversified Products,* 572 F. Supp. 883.

yet been developed at the time of Treasury's underlying antidumping determination of bicycle speedometers from Japan; while in the present case, shunt reactors had been developed prior to Treasury's antidumping determination of large power transformers from France. Second, in *Diversified Products,* it was the ITA which determined double-gear hub drive speedometers were within the scope of Treasury's antidumping finding; not Treasury, which in the present case had specifically included shunt reactors in the scope of its antidumping determination. Finally, in *Diversified Products,* double-gear hub drive speedometers were not determined to be within the scope of the underlying antidumping determination until after the effective date of the Trade Agreements Act of 1979; while in the present case, shunt reactors were included within the scope of the underlying antidumping determination prior to the effective date.

On appeal to this court, Alsthom asserts that its argument was not with the Treasury but with the ITA. Alsthom points out it was seeking a judgment in the lower court that the ITA determination "that shunt reactors were within the class of imported merchandise subject to the outstanding dumping order" was contrary to law. Alsthom specifically argues that: (1) transformers and shunt reactors are two separate classes or kinds of electrical equipment; (2) the Treasury, by including shunt reactors in its antidumping investigation of large power transformers from France, extended the scope of the investigation to include two classes or types of electrical equipment; (3) only merchandise found to have been sold at less than fair value can be included in an antidumping order; (4) the Treasury notice of sales at less than fair value did not mention shunt reactors; and (5) even assuming that shunt reactors were a specific type of large power transformer, none of them were imported.

Alsthom's assertion that its argument was not with the Treasury but with the ITA is untenable. In view of Alsthom's contentions as a whole, it is clear that Alsthom was seeking judicial review of Treasury's antidumping determination and not ITA's section 751 review. Alsthom's dissatisfaction with the Treasury's antidumping determination of shunt reactors cannot be cloaked in the guise of error on the part of the ITA in order to circumvent the Transitional Rules' procedural requirements for judicial review of antidumping determinations made prior to the effective date. We need not reach the merits of Alsthom's arguments concerning the inclusion of shunt reactors within the scope of Treasury's antidumping determination at this time.

B. *ITA Powers To Clarify Scope.*

The lower court, relying on *Diversified Products,* remanded this case to the ITA for a determination as to whether shunt reactors were within the class or kind of merchandise encompassed by large power transformers. The lower court specifically found the ITA to

be in error as to its initial determination that it had no authority to modify the scope of an underlying antidumping determination by Treasury. For the reasons set out below, we reverse the lower court on this issue.

Court of International Trade case law correctly recognizes that the ITA section 751 review of an antidumping determination of Treasury is limited by the scope of the underlying finding.[15] Although the ITA has the power, during a section 751 review, to determine whether an unclassified article is within the scope of an original Treasury antidumping finding,[16] the ITA cannot change the scope of an underlying antidumping determination when Treasury has *specifically* included the article within the scope of its underlying determination.[17]

Here, the Treasury made its antidumping determination in 1972. The Treasury's actions during its investigation indicate that its original less than fair value investigation involved a single class or kind of merchandise—large power transformers from France. The Treasury *specifically* determined that the class or kind of merchandise—large power transformers—included several forms of transformers including shunt reactors. There is no question that the class or kind of merchandise initially investigated by the Government included shunt reactors.

Alsthom contends that 19 U.S.C. § 1673 invested the ITA with the obligation to take up antidumping investigations where it found them in 1980 and to review every fact that was needed to fix the amount of dumping duty or deposit. Alsthom asserts that, in order for the ITA to perform this statutory task, the ITA first must have determined that there was an existing dumping finding that included shunt reactors, namely, whether shunt reactors are of the same type or class of merchandise as large power transformers. While it is true that the ITA must determine whether there was an existing dumping finding that included the item, once the ITA determines that the Treasury included the item under its original antidumping determination, the ITA's inquiry into that issue ceases. Alsthom's assertion, if accepted, would lead the ITA into an impossible task of reviewing de novo each and every Treasury antidumping determination to determine whether Treasury correctly included the article in question within the scope of its underlying antidumping determination. In a section 751 review, the ITA does not have the power to substitute its judgment for Treasury's when Treasury has specifically included an item within its antidumping determination.

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[15] *See Royal Business Machs., Inc.* v. *United States*, 507 F. Supp. 1007 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 692 (CCPA 1982); *Diversified Products*, 572 F. Supp. 883.

[16] *Id.* at 889.

[17] *Royal Business*, 507 F. Supp. at 1014.

IV. Conclusion

In view of the foregoing, we hold that Alsthom's challenge to the underlying antidumping determination made by the Treasury should have been dismissed by the lower court on the grounds of prematurity. The lower court further erred in determining that the ITA has the authority, during a section 751 review, to change the scope of Treasury's underlying dumping finding and in remanding the case back to the ITA.

REVERSED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

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Decisions of the United States Court of International Trade

(Slip Op. 86-30)

RAMON AZURIN AND GREGORIO ARANETA, PLAINTIFFS *v.* UNITED STATES AND WILLIAM VON RAAB, COMMISSIONER OF THE UNITED STATES CUSTOMS SERVICE, DEFENDANTS

Court No. 86-03-00336

Before DICARLO, *Judge.*

Plaintiffs, in an action for mandamus to compel the release of property in the custody of the United States Customs Service (Customs), move for a temporary restraining order preventing Customs from transferring copies of documents in Customs custody to any Committee of the United States House of Representatives, any representative of the Republic of the Philippines, or any other party, claiming that such transfer would violate Customs regulations, and plaintiffs' rights under the fourth and fifth amendments to the Constitution and to privacy.

Held: Plaintiffs, whose only interest in the documents is as agents for former president of the Republic of the Philippines, do not have a sufficient interest in the documents to assert that their rights to privacy will be violated by disclosure, nor do they have standing to assert the rights of the former president, who has not submitted to the jurisdiction of the Court.

[Plaintiffs' motion for a temporary restraining order is denied.]

(Decided March 17, 1986)

Anderson, Hibey, Nauheim & Blair (Eric I. Garfinkel and *Richard A. Hibey),* for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(J. Kevin Horgan* and *Elizabeth Seastrum),* for defendants.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs seek a temporary restraining order preventing the United States Customs Service (Customs) "from transferring * * * to any Committee of the United States House of Representatives, any representatives of the Republic of the Philippines, or to any other person"[1] originals or duplicates of property that arrived in the United States with Ferdinand E. Marcos, the

[1] Motion for Temporary Restraining Order at 1.

former president of the Republic of the Philippines, and his party on Februry 26, 1986.

Plaintiffs' motion is denied.

BACKGROUND

Arriving in the United States at Hickam Air Force Base, Hawaii, on February 26, 1986, Mr. Marcos and his party brought with them currency, documents, jewelry and other property. On March 7, 1986, plaintiff Araneta filed Customs Form 7501 and Entry Summary for certain property as "attorney-in-fact" for Mr. Marcos as importer of record.[2] On March 10, 1986, plaintiff Azurin executed a Customs Form 4790, Report of International Transportation of Currency or Monetary Instruments, on behalf of Mr. Marcos, covering currency. Neither plaintiff claims an ownership interest in any of the property currently in Customs custody.

Plaintiffs allege that all procedures incidental to Customs inspection and processing of the property were completed on March 12, 1986, but that Customs had received instructions not to release the property.

On March 13, 1986, plaintiffs, uncertain as to which court had jurisdiction, commenced mandamus actions in this Court and in the United States District Court for the District of Hawaii[3] seeking to compel Customs to release the property to plaintiffs.

In both mandamus actions it is alleged that Customs retention of the property violates section 142.19(b) of the Customs Regulations, 19 C.F.R. § 142.19(b) (1986), and plaintiffs' rights to freedom from unreasonable search and seizure, due process, and privacy. Plaintiffs invoke this Court's jurisdiction under 28 U.S.C. § 1581(i) (1) and (4) (1982). The Court finds that it has jurisdiction over the mandamus action.

Simultaneously with the filing of the actions for mandamus, plaintiffs sought temporary restraining orders in both courts to prevent Customs from releasing copies of the documents in Customs possession pursuant to formal requests from the Chairman and Ranking Minority Member of the Subcommittee on Asian and Pacific Affairs of the Foreign Affairs Committee of the United States House of Representatives and the Republic of the Philippines.[4] Plaintiffs claim a constitutional right to privacy would be violated by release of the documents.

At a conference immediately following the filing of plaintiffs' complaint and motion for restraining order, the Court directed that briefs be filed by the close of business the following day, and that counsel for both parties appear for oral argument on the motion on March 15, 1986.

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[2] Copies of the customs documents were received by the Court on March 17, 1986.

[3] *Azurin* v. *von Raab*, Civ. No. 86-0189 (D. Haw.).

[4] These requests are described *infra* at p. 10.

On March 14, 1986 the Court was informed by plaintiffs' counsel that the District Court for the District of Hawaii had issued a temporary restraining order *ex parte* enjoining defendant for ten days from allowing access to the property described in the Customs Form 7501 "except to those persons entitled to access pursuant to lawful subpoena, other legal process compelling production, or pursuant to the laws or treaties of the United States." [5] Since the order issued by the district court did not unconditionally prohibit access to the documents, plaintiff did not withdraw their motion for restraining order in this Court.

The Temporary Restraining Order

Although the motion before the Court is for a temporary restraining order, plaintiffs in their brief say the criteria for granting a preliminary injunction are appropriately applied to its motion. Since defendants received notice of plaintiffs' motion, and both parties were afforded an opportunity to be heard orally and in writing, the Court will consider, under an appropriately relaxed evidentiary standard, the criteria for issuance of a preliminary injunction. *Levas & Levas* v. *Village of Antioch,* 684 F.2d 446, 448 (7th Cir. 1982); *Ragold, Inc.* v. *Ferrero, U.S.A., Inc.,* 506 F. Supp. 117, 122-23 (N.D. Ill. 1980); 11 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 2951, at 499 (1973). These criteria are: (1) threat of immediate irreparable harm; (2) likelihood of success on the merits; (3) that the public interest would be better served by issuing rather than by denying the injunction; and (4) whether the balance of hardships on the parties favors issuing the injunction. *See Zenith Radio Corp.* v. *United States,* 1 Fed. Cir. 74, 76, 710 F.2d 806, 809 (1983); *S.J. Stile Associates, Ltd.* v. *Snyder,* 68 CCPA 27, 30, 646 F.2d 522, 525 (1981).

Irreparable Harm

An injury is irreparable if it cannot be undone through monetary remedies. *S.J. Stile Associates, Ltd.* v. *Snyder, supra; Spiegel* v. *City of Houston,* 636 F.2d 997 (5th Cir. 1981). Plaintiffs allege that their privacy rights will be irreparably injured if the documents are released. The Court agrees that "the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief." *Deerfield Medical Center* v. *City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981). But, for reasons stated in the following section of this opinion, the Court believes that plaintiffs have stated no privacy rights in this action, and, therefore, will suffer no irreparable injury if their motion is denied.

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[5] *Azurin* v. *von Raab,* Civ. No. 86-0189, at 2 (D. Haw. Mar. 13, 1986) (temporary restraining order).

Likelihood of Success

"It is unnecessary for plaintiffs to establish likelihood of success on the merits with 'mathematical probability'. *Committee to Preserve American Color Television and Imports Committee* v. *United States,* 4 CIT 202, 204, 551 F.Supp. 1142, 1144 (1982)." *American Institute for Imported Steel, Inc.* v. *United States,* 8 CIT 314, Slip Op. 84-132, at 8 (1984).

Plaintiffs make two claims: that Customs is unlawfully holding their property, and should return it to them, and that Customs is about to release unlawfully copies of the property to third parties.[6] The Court will consider the likelihood of success of each of these claims.

1. The Mandamus Claim To Compel Customs To Release the Property to Plaintiffs

Plaintiffs claim that Customs refusal to release the property to them violates section 142.19(b) of the Customs Regulations, 19 C.F.R. § 142.19(b), and violates plaintiffs' constitutional rights to be free from unreasonable search and seizure, to due process, and to privacy.

Plaintiffs' contention that 19 C.F.R. § 142.19(b)[7] requires Customs to release property that it has reason to believe may have been imported in violation of the laws or treaties of the United States cannot withstand scrutiny. Section 142.19(b) does not compel Customs to release imported merchandise, but recites the conditions upon which merchandise may be released. Indeed, section 142.19(b)(2) says that merchandise "shall not be released" unless Customs "determines that the merchandise may be admitted into the commerce of the United States."

Section 499 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1499 (1982), provides in part:

> *Imported merchandise,* required by law or regulations made in pursuance thereof to be inspected, examined, or appraised,

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[6] Plaintiffs' complaint states only the first of these claims; the second is contained in their motion for a temporary restraining order. At oral argument on March 15, 1986 plaintiffs orally moved, at the Court's suggestion, to amend their complaint to allege the second claim. Defendants have contested the Court's jurisdiction over this claim. The jurisdictional basis of the second claim is not alleged, but is presumably 28 U.S.C. § 1581(i). Since the Court denies the requested relief, it need not decide the jurisdictional issue. *See Secretary of the Navy* v. *Avrech,* 418 U.S. 676, 677-78 (1974) (per curiam) ("Without the benefit of further oral argument, we are unwilling to decide the difficult jurisdictional issue * * *. We believe that even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is thus foreordained.")

[7] 19 C.F.R. § 142.19 states in relevant part:

Merchandise, for which an entry summary serves as both an entry and an entry summary, shall not be released from Customs custody until an appropriate bond has been filed, or the entry has been liquidated, as follows:

* * * * * * *

(b) *After liquidation.* If a bond has not been filed in accordance with paragraph (a) of this section, the merchandise shall not be released before:

(1) The entry has been liquidated and the full amount of all duties and taxes due, including dumping or other special duties and charges, has been paid or the right to free entry established.

(2) The district director determines that the merchandise may be admitted into the commerce of the United States, and

(3) All documents relating to the merchandise which are required by law or regulation have been filed.

> *shall not be delivered from customs custody,* except under such bond or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the Customs Service is authorized, to enforce *until it has been inspected, examined, or appraised and is reported by the appropriate customs officer to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States* [emphasis added].

See United States v. *Garber,* 626 F.2d 1144, 1155 (3d Cir. 1980) ("customs custody of imported goods continues until the merchandise has been inspected, found to be correctly invoiced, and found to otherwise comply with the laws of the United States"). Customs regulations require that Customs hold imported merchandise until it has been examined. 19 C.F.R. §§ 142.3, 142.7 (1986).[8]

Defendants allege that Customs has not completed its inspection of the merchandise, and that there are conflicting claims to the imported property. The Central Bank of the Philippines has commenced an action in the United States District Court for the District of Hawaii seeking return of the currency. *Republic of the Philippines* v. *Marcos,* Civ. No. 86–0155 (D. Haw.). On March 14, 1986, the United States filed a motion to intervene, to file an answer, and a counterclaim in the nature of an interpleader in that action, in which the United States requests the District Court to determine the lawful owner of the currency and other merchandise currently in the possession of Customs. The Republic of the Philippines and the Asian and Pacific Affairs Subcommittee of the Foreign Affairs Committee of the House of Representatives have formally requested copies of all documents brought into the United States by Mr. Marcos and his party.[9] The purpose of both these requests is, in part, to investigate conflicting claims with respect to the ownership of the property claimed by plaintiffs.

Plaintiffs claim that *Fonseca* v. *Regan,* 734 F.2d 944 (2d Cir. 1984), supports their position that Customs must relinquish the property to them. In that case, plaintiff Fonseca sought to recover possession of a suitcase containing $250,000 misdirected to a New York airport from Bogota, Columbia. Plaintiff had no intent to enter the merchandise into the United States, nor did the United

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[8] Customs laws and regulations grant Customs broad authority to search and impound merchandise arriving in the United States. *See, e.g.,* 19 C.F.R. §§ 162.5, 162.6.

[9] On March 6, 1986 the Republic of the Philippines through counsel requested that the United States provide "all documents of any kind whatsoever * * * including, but not limited to, asset books, deeds, notes, security instruments, stocks, bonds, any and all negotiable instruments and any and all records of any kind whatsoever." Letter from Mark D. Bernstein to George Roberts, Director, United States Customs Service (Mar. 6, 1986). By diplomatic notes exchanged March 15, 1986, the Republic of the Philippines and the United States entered into an agreement by which the United States agreed to provide the Philippines "with copies of documents requested by it and relevant to its investigation that are now in the possession of U.S. Customs Service and taken into custody in Honolulu on February 26, 1986. It is understood that these documents will be used only for legitimate governmental purposes." The letter from counsel and agreement were provided to the Court as exhibits by defendants at the March 15, 1986 oral argument. *See also* Convention Between the Government of the United States of America and the Government of the Republic of the Philippines with Respect to Taxes on Income, Oct. 1, 1976, Art. 26, T.I.A.S. No. 10417 (contracting parties agree to exchange information "for the prevention of fraud or for the administration of statutory provisions concerning taxes").

States "demonstrate any colorable claim adverse to that of Fonseca, or even the presence of a legitimate individual claimant." *Id.* at 950. In this action the property was submitted to Customs custody for entry into the United States, and there are claims adverse to plaintiffs.

Plaintiffs say Customs would be without authority to hold property even in a case where it believed the property was stolen outside the United States and entered in violation of 18 U.S.C. § 2314 (1982).[10] For the reasons stated above, the Court finds no support for this view.

Plaintiffs also contend that Customs refusal to return the property to plaintiffs violates their rights under the fourth and fifth amendments to the Constitution, and to privacy.

The Court finds there is little likelihood of success with respect to plaintiffs' fourth amendment claim. There is no fourth amendment interest with respect to information voluntarily given to a government agency; such information cannot be subject to unreasonable search and seizure.[11] *See Couch* v. *United States,* 409 U.S. 322, 335 (1973).

Plaintiffs' claim of deprivation of property without due process in violation of the Fifth Amendment is premature. Plaintiff cites as authority *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency,* 461 U.S. 555 (1983). In that case the Supreme Court applied a four part test to determine if the length of time between seizure of property at the border and the initiation of legal process to determine rights in the property violated due process: length of delay, the reason for the delay, assertion of the claimant's right to recover the property, and prejudice to the claimant.[12] Here, the government has held the property less than three weeks. As stated *supra,* Customs says it has not finished inspecting the property, and that there are substantial indications of conflicting claims to the property. Plaintiffs have made only the barest allegation of prejudice in being deprived of use of the property.[13] *See United States* v. *Von Neumann,* 54 U.S.L.W. 4065 (U.S. Jan. 14, 1986).

Plaintiffs present no authority, and the court finds none, which compels Customs to release the imported merchandise to plaintiffs.

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[10] 18 U.S.C. § 2314 provides in part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 of more, knowing the same to have been stolen, converted or taken by fraud * * *.
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

See *United States* v. *Burger,* 728 F.2d 140 (2d Cir. 1984); *United States* v. *Noe,* 634 F.2d 860 (5th Cir.), *cert. denied,* 454 U.S. 876 (1981).

[11] For this reason, and for reasons discussed *infra,* plaintiffs have no constitutional rights to privacy violated by Customs continued retention of the property.

[12] The Court held that an 18-month delay in bringing forfeiture proceedings was reasonable since the government was diligently processing a mitigation petition and pursuing related criminal proceedings, and the claimant never indicated desire for speedy commencement of civil forfeiture proceedings.

[13] Plaintiffs' counsel alleges the denial of access to the property has caused plaintiffs "serious personal inconvenience and concern for unlawful invasion of their rights in the property." Affidavit of Richard A. Hibey, at ¶6.

The Court holds that plaintiffs have no likelihood of success, at the present time, on their mandamus claim.

2. The Privacy Claim To Enjoin Customs From Releasing Copies of the Property to Third Parties

Turning to plaintiffs' claims that their constitutional privacy rights are violated if Customs releases copies of the property to third parties, the question before the Court is whether plaintiffs assert a constitutionally protected interest in the property. Plaintiff Azurin asserts only that he executed a currency declaration form. Plaintiff Araneta alleges that he executed the entry as an "attorney-in-fact."

"Ordinarily, one may not claim standing * * * to vindicate the constitutional rights of some third party." *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1952). Plaintiffs make no claim that there is some "genuine obstacle" to the third party's assertion of its own rights, *Singleton* v. *Wulff*, 428 U.S. 106, 114–16 (1976), or that the privacy rights of the third party would be "diluted or adversely affected" should that party appear. *Cf. Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1962).

Plaintiffs do not provide any reason other than "convenience" why the party-in-interest, Mr. Marcos, is not a plaintiff in this action.[14]

The Court holds that since the plaintiffs have not asserted any ownership in the property or that they have any personal privacy right that is threatened with violation by Customs, and since they have not shown that they are entitled to assert the constitutional rights of third parties,[15] there is little likelihood that they will succeed on their claim seeking to enjoin release of copies or originals of documents.

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[14] At oral argument, there was the following colloquy with plaintiffs' attorney:

JUDGE DiCARLO: Are you saying these gentlemen who are acting as attorneys have a privacy interest in the property? Or is their interest to get the property back in their possession?

MR. HIBEY: Their purpose is to get the property back into the lawful possession of their principal, Ferdinand Marcos.

* * * * * * *

JUDGE DiCARLO: My only question is privacy interest; the constitutional rights raised by the plaintiffs. Who has those constitutional rights? Are they personal * * * to the people who have direct interest in the property?

MR. HIBEY: My suggestion to the Court is that they are personal, but not necessarily exclusive, that they have—that there is an umbrella which covers both by virtue of the fact that the principal here is clearly identified. That instead of using a customhouse broker, which is, I understand is not an unusual way for papers to be processed, he simply used individuals within his own retinue.

JUDGE DiCARLO: There are some situations in which a person is unable to present his own privacy claims, raise his own constitutional rights, and things such as that. Is there any reason why the actual owner of the properties in this case is unable or was unable to be a plaintiff in this action and raise the personal right of privacy for himself?

MR. HIBEY: It was only a matter of convenience that caused the papers to be executed in the way that they were executed.

JUDGE DiCARLO: So there was no reason why the owner of the property could not have appeared as a plaintiff, could not have asserted his own privacy rights, and could not have signed an affidavit as to how he would be individually injured, is that correct?

MR. HIBEY: I think that's correct * * *.

Transcript at 18–19.

[15] The Court will not speculate why Mr. Marcos did not submit to the jurisdiction of the Court.

The Public Interest and the Balance of Hardships

Defendants argue that "[i]f the United States reneges on its promise to the new Philippine Government of President Aquino to release to a specially established Philippine commission copies of these documents for purposes of their examination and investigation, the foreign relations of this country with an important and strategically critical Far Eastern nation may be adversely affected." [16] In support of that claim defendants submitted an affidavit by Michael H. Armacost, Under Secretary of State for Political Affairs, describing the importance and extent of the relationship between the Philippines and the United States, the profound changes which have recently occurred in the Philippines, and the importance to the foreign policy of the United States to fulfill the nation's pledge to assist the Aquino government in its investigation of the Marcos assets.

Inherent in plaintiffs' argument is the claim that the public interest is better served by protecting their asserted constitutional privacy rights than by disclosing copies of the documents to third parties.

The Court recognizes that there may be circumstances in which the public interest requires that constitutional rights of individuals outweigh foreign policy concerns. However, since the Court finds that plaintiffs' constitutional rights are not threatened and that plaintiffs may not assert the constitutional rights of a third party, the Court holds that the public interest would be best served by denying the motion.

In view of the Court's finding that each of the above factors favors denial of the motion, the balance of the equities weighs in favor of defendants.

The motion is denied. So ordered.

(Slip Op. 86-31)

ICC INDUSTRIES, INC.; ICD GROUP, INC., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 84-2-00252

Before WATSON, *Judge.*

OPINION

[Plaintiffs' motion for judgment on the agency record denied.]

(Decided March 19, 1986)

CRITICAL CIRCUMSTANCES

The court sustains the determinations of the Department of Commerce that criti-

[16] Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order at 25.

cal circumstances existed with respect to the importation of potassium permanganate from the Peoples Republic of China; and further sustains the determination of the International Trade Commission that the circumstances justified the retroactive imposition of antidumping duties in order to prevent the recurrence of material injury.

Brownstein Zeidman and Schomer (*Steven P. Kersner* and *Donald S. Stein* of counsel), for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, (*J. Kevin Horgan*, attorney Commercial Litigation Branch); *Berniece A. Browne*, Senior Trial Counsel, Office of the Assistant General Counsel for Import Administration, Department of Commerce; *Carol McCue Veratti*, attorney, Office of the General Counsel, United States International Trade Commission, for defendants.

WATSON, *Judge:* This action challenge agency determinations [1] which gave a retroactive effect to the imposition of antidumping duties on importations of potassium permanganate from the Peoples Republic of China (PRC). To achieve retroactive effect the Commerce Department had to make a final determination that "critical circumstances" existed under the terms of 19 U.S.C. § 1673d(a)(3)[2] and then the International Trade Commission had to make additional finding under 19 U.S.C. § 1673d(b)(4)(A)[3] that retroactive duties were needed to prevent a recurrence of material injury. Both of these determinations are challenged as being unsupported by substantial evidence and otherwise not in accordance with the law.

Normally, a determination that importations are being sold at less than fair value will begin to have an effect only as to those entries of merchandise entered after the date of publication of the notice of the preliminary determination by the Commerce Department. Liquidation of those entries will be suspended and the posting of security for the payment of estimated duty will be ordered in

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[1] The final determination of the Department of Commerce was published in 48 Fed Reg. 57347.
The final determination of the International Trade Commission was published in 49 Fed Reg. 3148 and USITC Publication 1480 (January 1984).

[2] 19 U.S.C. § 1673d(a).

* * * * * * *

(3) Critical circumstances determinations.—If the final determination of the administering authority is affirmative, then that determination, in any investigation in which the presence of critical circumstances has been alleged under section 1673b(e) of this title, shall also contain a finding of whether—
(A)(i) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or
(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and
(B) there have been massive imports of the merchandise which is the subject of the investigation over a relatively short period.

[3] 19 U.S.C. § 1673d(b)

* * * * * * *

(4) Certain additional findings.—
(A) If the finding of the administering authority under subsection (a)(2) of this section is affirmative, then the final determination of the Commission shall include a finding as to whether the material injury is by reason of massive imports described in subsection (a)(3) of this section to an extent that, in order to prevent such material injury from recurring, it is necessary to impose the duty imposed by section 1673 of this title retroactively on those imports.

* * * * * * *

the manner set out in 19 U.S.C. § 1673b(d).[4] However, in conditions known as "critical circumstances", under the terms of 19 U.S.C. § 1673b(e)(2)[5] the suspension of liquidation and the ultimate obligation to pay antidumping duty can apply to entries of merchandise made during the ninety-day period *prior* to the normal date of suspension of liquidation.

The law provides that if the Commerce Department finds that massive importations have occurred and there is either a history of dumping or actual or constructive knowledge by the importers that the merchandise under investigation is being dumped, then the ultimate determination can affect unliquidated entries made in the expanded, pre-suspension ninety-day period.

The "critical circumstances" which justify the expanded effect of the investigative determination can be determined by the Commerce Department as a preliminary matter under 19 U.S.C. § 1673b(e), or, even if the preliminary determination on that question is negative, can be found as part of the final determination under 19 U.S.C. § 1673d(a)(3).

As a preliminary matter, "critical circumstances" may be found on the basis of belief or suspicion by the Commerce Department that the statutory conditions are present. As a final matter, however, given the standard of judicial review to which it is subjected under 19 U.S.C. §§ 1516a(a)(2)(B)(i) and 1516a(b)(1)(B), the determination must be supported by substantial evidence.

In this case, because there ws no history of dumping of potassium permanganate from the Peoples Republic of China, the final determination depends first, on the existence of massive imports, a fact which is amply supported by substantial evidence, and, second, on a finding that the importers knew or should have known that the merchandise was selling at less than fair value. The latter finding is disputed by plaintiffs.

The determination by the Department of Commerce that importers knew or should have known that the potassium permanganate was being sold at less than fair value was expressed, at 48 Fed. Reg. 57349–50, as follows:

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[4] 19 U.S.C. § 1673b

* * * * * * *

(d) Effect of determination by the administering authority.—If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority—

(1) shall order the suspension of liquidation of all entries of merchandise subject to the determination which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of the determination in the Federal Register.

(2) shall order the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry for the merchandise concerned equal to the estimated average amount by which the foreign market value exceeds the Untied States price.

* * * * * * *

[5] 19 U.S.C. § 1673b(e)

* * * * * * *

(2) Suspension of liquidation.—If the determination of the adminstering authority under paragraph (1) is affirmative, then any suspension of liquidation ordered under subsection (d)(1) of this section shall apply, or, if notice of such suspension of liquidation is already published, be amended to apply, to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the date on which suspension of liquidation was first ordered.

> . . . After considering all of the circumstances in this industry, we conclude that U.S. importers knew or should have known that potassium permanganate from the PRC was being sold in the United States at less than its fair value. The following factors have led us to that conclusion:
> First, since U.S. importers admitted that the potassium permanganate bought at "competitive prices" in the European market and subsequently imported into the United States was PRC material, they were clearly aware of the price at which potassium permanganate from the PRC, both directly from the PRC and indirectly through Europe, was being sold for in the U.S. and European markets.
> Second, since importers were also aware of pricing of potassium permanganate in the U.S. market place from the two other alternative sources (Carus [the United States producer] and Spain), they were aware of the entire range of pricing in a market place where pricing is a major factor in determining sales.
> Third, since Spain is not a state-controlled economy country and the only other principal producer of the product that exports to the United States, importers knew or should have known, at least generally, what the value of the product is in market economy countries, and thus the minimum likely fair value of the PRC merchandise.
> Fourth, during the period of March through July, 1983, (from Initiation of this investigation), the unit price of potassium permanganate imported into the U.S. from the PRC was 22% less than permanganate imported from Spain (all other sources). Importers should have known how to anticipate our antidumping methodology for Spain. They clearly knew that potassium permanganate from the PRC was being sold well below the Spanish price.
> Fifth, knowing that potassium permanganate from the PRC was priced significantly below that sold by the only other non-U.S. market economy producer (i.e., the most likely source of our fair value standard), importers knew or should have known that the PRC exports were at less than fair value.
> Based on the preceding analysis, we determine that the unique circumstances found in this industry are such that we can impute knowledge of sales at less-than fair value to the importers even though they could not anticipate the exact basis for our fair value determination.

When the conclusions of the Commerce Department are reduced to essentials, the five supporting factors are really one—that the importer knew that the price at which they were importing was 22% below the price of importations from Spain. This is the most concrete and "damaging" piece of knowledge attributed to the importers—the price was 22% below the lowest price at which the merchandise was being sold to the United States.

The question then becomes whether this sort of knowledge, i.e., of price differential alone, is sufficient to establish or impute knowledge on the part of the importer that the product is being

sold at less than fair value. The Commerce Department is concerned that if it cannot make inferences and attribute knowledge of dumping based on knowledge of price differentials, massive injurious imports from state-controlled economies can enter with impunity during the first dumping investigation of a product from those countries.

This would come about because a foreign market value in a country with a state-controlled economy may not be immediately ascertainable under 19 U.S.C. § 1677b(a). This is a circumstance which is recognized in 19 U.S.C. § 1677b(c)[6] in which special indirect methods have been provided for determining the foreign market value of merchandise in state-controlled economies.

Although the issue is not without its difficulties, the court is of the opinion that in a close-knit international market for a fungible commodity, a price differential between the price from a state-controlled economy and the price from a market economy, of the magnitude involved here, is sufficient to alert importers to the fact that the product from the state-controlled economy is being sold at less than fair value. Accordingly, it may fairly be said that, even considering that there is no immediately ascertainable market value in the home market of a state-controlled economy and even absent any knowledge of how fair market value would ultimately be calculated for the country of production, the importers should have known that the price was "too good to be true" and too low to emerge unscathed from administrative scrutiny.

It must be admitted that this situation represents a minimal factual predicate for imputing knowledge to an importer and a considerable allowance of discretion to the agency. But in view of the possibility that otherwise the law could not cope with the first occurrence of massive, dumped imports from a state-controlled economy, it appears to be an unavoidable exercise of agency expertise in an emergency situation. When done with attention to the structure of the international market, the nature of the commodity and the magnitude of the price differential, it is a permissible determination and those factors constitute substantial evidence in these circumstances.

In sum, the determination of the Commerce Department is within the range of discretion it has been accorded, *Consumer Products Div., SCM Corp.* v. *United States,* 753 F.2d 1033 (Fed. Cir.

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[6] 19 U.S.C. § 1677b

* * * * * * *

(c) State-controlled economies.—If available information indicates to the administering authority that the economy of the country from which the merchandise is exported is State-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section, the administering authority shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either—

(1) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of a non-State-controlled-economy country or countries is sold either—

(A) for consumption in the home market of that country or countries, or

(B) to other countries, including the United States; or

(2) the constructed value of such or similar merchandise in a non-State-controlled-economy country or countries as determined under subsection (e) of this section.

1985), and is supported by the degree of evidence which has been found sufficient in such matters. *Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1562 (Fed. Cir. 1984).

Plaintiffs have also challenged the final determination of the International Trade Commission (ITC) on the subject of critical circumstances for failing to separately find a causal link between the massive imports and the material injury.

The statutory language governing the ITC determination reads as follows:

> 19 U.S.C. § 1673d
>
> (b) * * *.
>
> (4) Certain additional findings.
>
> (A) If the finding of the administering authority under subsection (a)(2) of this section is affirmative, then the final determination of the Commission shall include a finding as to whether the material injury is by reason of massive imports described in subsection (a)(3) of this section to an extent that, in order to prevent such material injury from recurring, it is necessary to impose the duty imposed by section 1673 of this title retroactively on those imports.

In the opinion of the court, where a finding has been made that imports priced at less than fair value are being knowingly entered in massive quantities during an investigation, the ITC is not required by law or considerations of fairness to isolate the massive quantities and make them the separate subject of an injury determination.

In those circumstances it is sufficient if the ITC concentrates on the capacity of these massive imports to render ineffectual the normal imposition of duties (prospectively from the date of publication of the preliminary determination) and thereby bring about a recurrence of the material injury primarily caused by normal levels of importation.

It must be admitted that the language of 19 U.S.C. § 1673d(b)(4)(A) can be read as requiring that material injury be attributed to the massive imports by themselves, rather than to the entire corpus of normal and massive imports, as was done here. But that reading, although it is possible, does not harmonize with the special purpose of a provision for critical circumstances. In this instance, the clear emergency purpose of the provision justifies a greater than normal flexibility in its interpretation and in the analysis and treatment of massive imports entered during an investigation.

With some effort, it is possible to read this provision as speaking to the material injury caused by both normal and massive imports, with the participation of the massive imports being more as an instrument of recurrence than as an original or separate cause. It is even possible to read this provision as presuming the participation of the massive imports in the material injury caused by the normal

imports and focusing on whether that presumed participation is to an extent which necessitates the retroactive imposition of duty.

These are flexible readings, and the necessary result could have been expressed far more clearly in the statute. What is important however, is that these readings harmonize with the purposes of retroactive duty better than a rigid construction.

On the other hand, a strict interpretation of the language to require a separate injury determination for the massive imports, raises the problem that it may be administratively impossible to measure the actual injurious effect of massive importations entered during the investigation. This might be due to the time limits on the investigation and the possibility that the investigation ends before the normal measurable market response can be ascertained. While the degree of investigative difficulty would not be a factor in the face of a clear legislative requirement, it does influence the interpretation when reasonable alternatives are available.

This result is not unfair because it still requires the application of expertise to evidentiary facts regarding the massive imports, albeit not to the extent required if the massive imports were the subject of a discrete injury investigation. It is the massiveness itself which can be measured and evaluated.

The volume of the massive imports is the crucial subject. Given the underlying knowledge or pattern of dumping during an investigation and the peculiar urgency of the situation, it is sufficient if the ITC finds that the volumes will cause a recurrence of injury if retroactive duty is not imposed.

Given the express legislative intent to deter circumvention of the law by those who would increase imports during the process of investigation, it would seem that the purpose of the additional provision for critical circumstances is to prevent recurrence of the injury already being caused by previous imports. *See,* H. Rep. No. 317, 96th Cong., 1st Sess. 63 (1979).

Massive imports which arrive during the investigation and are found by the Commerce Department to have a history of dumping or to be knowingly bought at less than fair value do not have to be the subject of a separate injury analysis. Their injurious effect, coming on top of previous importations found to be injurious, may be easily and legitimately inferred. As to them, the requirement of additional findings is not meant to complicate the Commission's analysis of causation, but merely to require the Commission to determine whether the extent of massive imports will carry the injury already found to have occurred, beyond its normal duration unless retroactive duties are imposed.

On this subject, there is good reason to credit the expertise of the ITC. If a high degree of deference to the agency is justified anywhere, it is justified in its analysis of massive imports entered with questionable motives during an investigation. Cf. *Matsushita Elec-*

tric Industrial Co., Ltd. v. *United States*, 750 F.2d 924 (Fed. Cir. 1984).

The evidence of record clearly supports the determination that massive importations during the period from April through July 1983 were of such an extent that, in order to prevent the recurrence of material injury, retroactive duties had to be imposed. In April 1983 alone, importations were almost four times greater than in the entire period from April through July 1982. This being the case, the ITC's additional findings were, in these circumstances, supported by substantial evidence.

For the reasons discussed above the court finds that both determinations at issue here were supported by substantial evidence and were otherwise in accordance with the law. Accordingly, plaintiffs' motion for judgment is hereby denied and it is further

ORDERED that the Department of Commerce, International Trade Administration's final affirmative determination of sales at less than fair value of potassium permanganate from the Peoples Republic of China, 48 Fed. Reg. 57347 (December 29, 1983), and the International Trade Commission's final affirmative determination of material injury with respect to potassium permanganate from the Peoples Republic of China, 49 Fed. Reg. 3148 (January 25, 1984), be, and they hereby are, sustained in all respects.

(Slip Op. 86-32)

EAC ENGINEERING DIVISION OF THE EAST ASIATIC CO., INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 82-1-00096

Before: RE, *Chief Judge.*

SPARK DETECTORS

(Decided March 20, 1986)

Metzger, Shadyac & Schwartz (Carl Schwartz and Wesley K. Caine), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Florence M. Peterson)*, for the defendant.

RE, CHIEF JUDGE: This action is before the Court pursuant to the Court's order of remand dated November 26, 1985, *EAC Engineering Div. of the East Asiatic Co.* v. *United States*, 9 CIT ——, 624 F. Supp. 569 (1985).

The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from the Federal Republic of Germany, and described on the customs invoices as "spark detection systems." The merchandise was classified by the Customs Service as "optical instruments"

under item 712.05 of the Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty of 25 per centum ad valorem.

Plaintiff protested this classification, contending that the merchandise was properly classifiable under item 712.15, TSUS, as "Instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or similar radiations, and parts thereof," with a duty rate of 6.7 per centum ad valorem in 1980 and 7 per centum ad valorem in 1979. Alternatively, plaintiff contended that the merchandise was classifiable under either item 712.49, TSUS, a "basket" provision for electrical measuring and checking instruments, or under items 688.40 or 688.45, TSUS, depending upon the year of importation, as electrical articles not specially provided for.

On the parties' cross-motions for summary judgment, this Court determined that the Customs Service's original classification of the imported "spark detectors" as "optical instruments" under item 712.05, TSUS, was incorrect. *EAC Engineering Div. of the East Asiatic Co.* v. *United States*, 9 CIT ——, 623 F. Supp. 1255, 1261 (1985). Since material issues of fact pertaining to the plaintiff's proposed alternative classifications remained unresolved, the Court remanded the action to the Customs Service. The remand was intended to permit the Customs Service to consider the alternative classifications at the administrative level, and to determine the appropriate classification of the imported merchandise. In order to ensure expeditious resolution of this dispute, the Court retained jurisdiction over the action.

On remand, the Customs Service determined that the imported merchandise was properly classifiable under items 688.40 or 688.45, TSUS, depending upon the year of entry, as electrical articles not specially provided for. Plaintiff has advised the Court by letter that it is "fully satisfied" with Customs determination.

Based upon the Customs Service's determination on remand, and plaintiff's agreement that the imported "spark detectors" should be classified as electrical articles not specially provided for, it is hereby

ORDERED that the Customs Service reliquidate the subject merchandise under either item 688.40 or item 688.45, according to the date of entry.

(Slip Op. 86-33)

YURI FASHIONS CO., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT AND AMERICAN FIBER/TEXTILE/APPAREL COALITION, DEFENDANT-INTERVENOR

Court No. 84-12-01807

Before DICARLO, *Judge.*

Plaintiff challenges exclusion of merchandise imported from the Commonwealth of the Northern Mariana Islands (CNMI), an insular possession of the United States.

Applying 19 C.F.R. § 12.130(b), a regulation issued pursuant to the President's authority to regulate textile imports, the Customs Service determined the country of origin of the merchandise was Korea and excluded the merchandise because it was not accompanied by export visas from Korea. Plaintiff says the merchandise is a product of the CNMI pursuant to General Headnote 3(a) of the Tariff Schedules of the United States, and that section 12.130(b) is *ultra vires* as applied to its merchandise. Plaintiff also seeks a declaratory judgment that (1) section 12.130 is invalid as applied to products of the CNMI and (2) a directive by the Chairman of the Committee for the Implementation of Textile Agreements (CITA) excluding some products imported from the CNMI from the application of section 12.130 is *ultra vires.*

Held: General Headnote 3(a) expressly speaks only to the rates of duty for articles imported into the United States from insular possessions. Congress has not limited its delegation of authority to the President to define products of "countries" for textile restraint purposes to exclude from such restraints imports from insular possessions. Plaintiff lacks standing to seek a declaratory judgment (1) that the regulation is invalid as applied to products of the CNMI, since plaintiff's merchandise is a product of Korea, and (2) That the CITA directive is *ultra vires,* since plaintiff fails to allege and facts indicating that it is adversely affected or aggrieved by the directive.

[Defendant's cross-motion for summary judgment granted.]

(Decided March 24, 1986)

Barnes, Richardson & Colburn (Andrew P. Vance and *Michael A. Johnson*) for plaintiff.

Donald C. Woodworth for *amicus curiae* Commonwealth of the Northern Mariana Islands.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division Department of Justice (*Velta A Melnbrencis*) for defendant.

Miller & Chevalier, Chartered (*Donald Harrison)* for defendant-intervenor.

Memorandum Opinion and Order

DiCarlo, *Judge:* Plaintiff challenges the exclusion of sweaters imported from the Commonwealth of Northern Mariana Islands (CNMI) and seeks a declaratory judgment that a regulation, 19 C.F.R. § 12.130(b) (1985),[1] defining textile products of insular possessions of the United States of purposes of quota restraints, is *ultra vires* and void.

Plaintiff's merchandise was denied entry on the grounds it was not accompanied by export visas from the Republic of Korea (Korea), which the United States Customs Service (Customs) maintained was the country of origin of the merchandise, pursuant to 19 C.F.R. § 12.130(b). Plaintiff says its merchandise is a product of the CNMI for all purposes, pursuant to General Headnote 3(a) of the Tariff Schedules of the United States (TSUS), and cannot be excluded from entry as a product of Korea by virtue of 19 C.F.R. §

[1] 19 C.F.R. § 12.130 was published as an interim regulation by T.D. 84-171 Fed Reg. 31248 (August 3, 1984) and as a final regulation by T D. 85-38, 50 Fed. Reg. 8710 (March 5, 1985). Plaintiff's merchandise was excluded by virtue of the interim regulation. Since plaintiff's merchandise would also be be excluded under the final regulation, which differs, with respect to insular possessions, from the interim regulation only in form, the court considers the final regulation. *See infra,* note.

12.130(b). Plaintiff also argues that regulation is *ultra vires* as applied to the CNMI.

Plaintiff alleges jurisdiction pursuant to 28 U.S.C. §§ 1581(a)[2] 1581(i)(3) (1982), and seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 (1982) and Rule 57 of the Rules of this Court.

The American Fiber/Textile/Apparel Coalition, a coalition of twenty-one American trade associations and unions whose members are involved in production of textiles and textile products, was granted leave to intervene as a party defendant in that part of this action brought under 28 U.S.C. § 1581(i).[3] The CNMI, through its Resident Representative to the United States, was granted leave to appear as *amicus curiae.*

Plaintiff moves, and defendant cross-moves, for summary judgment. The parties agree that no issues of material fact are disputed.

The Court holds that 19 C.F.R. § 12.130(b) does not conflict with General Headnote 3(a).

I. The Exclusion of Plaintiff's Merchandise

In November, 1984 plaintiff attempted to enter a shipment of sweaters processed in the CNMI from components made in Korea. The merchandise was accompanied by a completed Customs Form 3229, certifying that more than fifty percent of the total value of the merchandise was added by materials made and labor performed in the CNMI. Applying 19 C.F.R. § 12.130, Customs determined that the country of origin of the sweaters was Korea.[4] Since the merchandise was not accompanied by export visas from Korea, the merchandise was refused entry.

Plaintiff contends that General Headnote 3(a), TSUS, precludes application of 19 C.F.R. § 12.130 to its merchandise. Plaintiff says that its merchandise is a "product of manufacture" of the CNMI

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[2] Plaintiff protested the exclusion of its merchandise and demanded action on the protest within 30 days pursuant to 19 C.F.R. § 174.21(b) (1984), Plaintiff brought the action under 19 U.S.C. § 1515(b) (1982) and 28 U.S.C. §1581(a) when no action was taken, and the protest deemed denied, after 30 days.

[3] 28 U.S.C. § 2631(j)(1)(A) (1982) provides that

> Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—
>
> no person may intervene in a civil action under section 515 * * * of the Tariff Act of 1930 * * *.

Thus intervention is not permitted where the court has jurisdiction under 28 U.S.C. § 1581 (a) over a cause of action to contest the denial of a protest under 19 U.S.C. § 1515.

[4] 19 C.F.R. § 12.130 changed the country of origin requirements for textiles and textile products subject to quantitative restraints. In order for a textile product manufactured in two countries to have the second country as its country or origin for quota purposes, the product must undergo "substantial transformation" in the second country. Section 12.130(b) states in part:

> For the purpose of this section * * * a textile or textile product, subject to section 204, Agricultural Act of 1956, as amended, imported into the customs territory of the United States, shall be a product of a particular foreign territory or country, or insular possession of the U.S., if it is wholly the growth, product, or manufacture of that foreign territory or country, or insular possession. However * * * a textile or textile product, subject to section 204, which consists of materials produced or derived from, or processed in, more than one foreign territory or country, or insular possession of the U.S., shall be a product of that foreign territory or country, or insular possession where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

See Mast Industries, Inc. v. *Regan,* 8 CIT 214, 596 F. Supp. 1567 (1984) (upholding section 12.130 as within the authority delegated to the President under section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854 (1982)).

under General Headnote 3(a) for all purposes, and may not have another country as its country of origin for textile restraint purposes unless so provided for by act of Congress. The Court disagrees.

A. General Headnote 3(a)

By its terms, General Headnote 3(a)[5] regulates only the *duty* paid on imports from insular possessions, such as the CNMI. The headnote is captioned "Rates of Duty" and it expressly speaks only to the "rates of duty" for articles imported into the customs territory of the United States.

The Court agrees with the recent holding of the Court of Appeals for the Ninth Circuit that nothing in the headnote addresses quota or other restrictions:

> Headnote 3(a) applies solely to tariffs and duties * * *. [A]fter examining the common meanings of the words "duty" and "quota," we conclude that "duty" cannot be read to encompass "quotas" * * *. Consequently we hold that that Headnote 3(a) does not apply to quotas, and therefore, that it did not preempt the quota restrictions imposed [on the imported merchandise].

United States v. *Patel,* 762, F.2d 784, 790–91 (9th Cir. 1985). Plaintiff says that *Patel,* in which fraudulent violation of import laws was alleged, turned on very different facts than this case, and that the Ninth Circuit apparently overlooked headnote 6 of schedule 7, part 2, subpart E (setting a quota on timepieces imported from insular possessions), when the Court said that it "can find absolutely no reference to quotas in any part" of the TSUS. 762 F.2d at 791. But neither of these observations provide a reason why the *Patel* Court's interpretation of General Headnote 3(a) should not be followed.

The Court also disagrees with plaintiff's argument that the legislative history of General Headnote 3(a) indicates that Congress intended that provision to define the country of origin of merchandise imported from insular possessions for all purposes.

A tariff preference for goods from all insular possessions of the United States was first enacted as part of the Customs Simplification Act of 1954, Pub. L. 768, 68 Stat. 1136, 1139, § 401 (enacted as

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[5] At the time of the attempted entry, in 1984, General Headnote 3(a) provided, in part:

Rates of Duty

(a) *Products of Insular Possessions.*

(i) Except as provided in headnote 6 of schedule 7, part 2, subpart E, and except as provided in headnote 3 of schedule 7, part 7, subpart A, *articles imported from insular possessions of the United States which are outside the customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the schedules, except that all such articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession or of the customs territory of the United States, or of both, which do not contain foreign materials to the value of more than 50 percent of their total value* (or more than 70 percent of their total value with respect to watches and watch movements), coming to the customs territory of the United States directly from any such possession, and all articles previously imported into the customs territory of the United States with payment of all applicable duties and taxes imposed upon or by reason of importation which were shipped from the United States, without remission, refund, or drawback of such duties or taxes, directly to the possession from which they are being returned by direct shipment, *are exempt from duty* [emphasis added].

section 301 of the Tariff Act of 1930), which stated in pertinent part:

> There shall be levied, collected, and paid upon all articles coming into the United States from any of its insular possessions * * * the *rates of duty* which are required to be levied, collected, and paid upon like articles imported from foreign countries; *except that all articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession or of the United States, or of both, which do not contain foreign materials to the value of more than 50 per centum of their total value* * * * shall be admitted *free of duty* upon compliance with such regulations as to proof of origin as may be prescribed by the Secretary of the Treasury [emphasis added].

According to its legislative history, this provision was intended to

> provide for the *duty status* of importations from the insular possessions of the United States. The new section would provide that all articles imported from an insular possession of the United States * * * shall be dutiable at the same rates as are importations from foreign countries, except those which (1) are entirely of native origin or (2) *are manufactured in such possession and do not contain over 50 percent of foreign materials* * * *.

S. Rep. No. 2326, 83rd Cong., 2d Sess. (1954) *reprinted in,* 1954 U.S. Code Cong. & Ad. News 3, 3900, 3905 (emphasis added).

General Headnote 3(a) was enacted as part of the Tariff Schedules of the United States in 1962, by the Tariff Classification Act of 1962, Public Law 87-456, 76 Stat. 72. The *Tariff Classification Study* published by the Tariff Commission stated that:

> General headnotes 3 and 4 prescribe the conditions obtaining with respect to the *"Rates of duty"* columns numbered 1 and 2 in the proposed revised schedules. In doing so, general headnote 3 covers the substance of the special treatment presently accorded to products of insular possession (under par. 301 of the Tariff Act of 1930, as amended) * * *.

Submitting Report, Vol. 1, p. 17 (emphasis added).[6]

In 1966, Congress considered the tariff status of products of insular possessions in enacting headnotes to Schedule 7 of the TSUS to establish quotas on importation of timepieces and a special country of origin rule for buttons from insular possessions. The legislative history of Pub. L. 89-805, providing for the timepiece quota, states, in part:

> Under paragraph (a) of general headnote 3 of the TSUS articles, *the growth or product of a U.S. insular possession* outside

[6] *The Tariff Classification Study* is considered an important source of legislative history of the Tariff Schedules. *United States v. Andrew Fisher Cycle Co.*, 57 CCPA 102, 106-07, C.A.D. 986, 426 F.2d 1308, 1311 (1970); *see* 2 R. Sturm, *Customs Law and Administration*, § 52.2, 10-13 (1985) (citing cases).

> the customs territory of the United States, *are free of duty when imported into the U.S. customs territory if they do not contain foreign materials to the value of more than 50 percent of their total value.*

S. Rep. 1679, 89th Cong., 2d Sess. (1966), *reprinted in*, 1966 U.S. Code Cong. & Ad. News 4389, 4390 (emphasis added). The legislative history of Pub. L. 89–809, providing for the country of origin rule for buttons, describes General Headnote 3(a) as providing an "advantage" for goods from insular possessions.

> This advantage consists of *duty-free treatment* for articles coming from the insular possessions *If they meet two simple tests.* First, the article arriving from the prossession must have a value at least double the value of the foreign materials contained in it. *Second, it must have been subjected to some manufacturing or processing operation in the possession.*

S. Rep. 1600, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 4398, 4401 (emphasis added).[7]

From the legislative history of General Headnote 3(a), the Court draws two conclusions. First, nothing in the legislative history of General Headnote 3(a) known to the Court indicates that the headnote was intended to regulate anything other than rate of duty. *See Patel, supra.* Second, the legislative history indicates that Congress intended that General Headnote 3(a) grant duty-free treatment to merchandise which (1) is a growth, product or manufacture of an insular possession and (2) satisfies a specified percentage of its value derived from the insular possession. Congress has never specified how merchandise is to be defined as a growth, product or manufacture of an insular possession.[8] Congress presumably left definition of these terms to the Executive branch.

Plaintiff points to the quotas Congress enacted on timepieces imported from insular possessions, apparently to argue that Congress has reserved for itself authority to enact quotas on merchandise which met the rule of origin stated in General Headnote 3(a). But the fact that Congress has enacted quotas with respect to one kind

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[7] Congress also amended General Headnote 3(a) in 1974 and 1983 to implement the Generalized System of Preferences and the Carribean Basin Initiative, respectively. The Trade Act of 1974, Pub. L. 98–618, 88 Stat. 1978, § 502; Caribbean Basin Economic Recovery Act, Pub. L. 98–67, 97 Stat. 392, § 214(a)(1)(B). Both enactments altered the foreign content permissible with respect to duty-free entry of goods from insular possessions. Neither enactment is accompanied by any indication that Congress created or approved any particular administrative test for "product" of an insular possession.

[8] *Amicus curiae* argues that General Headnote 3(a) establishes a single "value added" test, referring to legislative history of the Tariff Act of 1909, Ch. 6, 35 Stat. 11, § 5 (1909), and the Tariff Act of 1930, Ch. 497, 46 Stat. 590, § 301 (1930), which provided for duty-free treatment for imports from the Philippine Islands.

The two-prong test was established in the Customs Simplification Act of 1954, the first legislation to permit duty-free entry of imports from the CNMI. As Customs Ruling CLA–2 CO:R:CV:G 553239 PR, issued to plaintiff after promulgation of 19 C.F.R. § 12.130, recognizes, Customs had an established and uniform practice of defining "products" of insular possessions, a requirement that was additional to the value added test. In a previous ruling, Customs described that practice as follows:

> Whether an article is a "product" of an insular possession within the meaning of General Headnote 3(a), TSUS, depends upon whether substantial processing operations are performed in the insular possession. Customs has consistently ruled that Headnote 3(a) requires more than merely "some processing." Articles imported into the insular possession must undergo extensive operations to satisfy the requirement that the merchandise be the growth or production of the possession.

On August 2, 1985 Customs proposed a change in this established and uniform practice in order to conform the definition of product under General Headnote 3(a) with the country of origin rule of section 12.130(b). 50 Fed. Reg. 3193.

of merchandise hardly argues that it has not delegated to executive branch authority to adopt other country of origin rules for non duty purposes.

B. 19 C.F.R. § 12.130 and the CNMI

Plaintiff and *amicus curiae* argue at length that Customs had no authority to exclude products imported from the CNMI under 19 C.F.R. § 12.130 since (1) the source of executive power to regulate textile imports is section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854 (1982),[9] (2) that statute grants the President authority to issue regulations governing importation of products of "countries", and (3) the CNMI is not a country, but an insular possession in commonwealth status with the United States.[10]

But, plaintiff's merchandise was excluded because it was determined to be a product of *Korea*, not the CNMI. The President has been delegated broad authority under section 204 to negotiate textile restraint agreements with other nations, and to order the promulgation of regulations to carry out such agreements. *See American Association of Exporters and Importers—Textile and Apparel Group* v. *United States*, 751 F.2d 1239 (Fed. Cir. 1985). Pursuant to this authority, the United States entered into an agreement with Korea limiting imports of textile products from that country into the United States, and the President ordered 19 C.F.R. § 12.130 promulgated to prevent the circumvention and frustration of such agreements. *See* Exec. Order No. 12475, 49 Fed. Reg. 19955 (May 11, 1984). Plaintiff does not question the President's authority to negotiate such an agreement with Korea, or to order the promulgation of section 12.130 to carry out such agreements. *See Mast Industries, Inc.* v. *Regan*, 8 CIT 214, 596 F. Supp. 1567 (1984); *American Association of Exporters and Importers—Textile and Apparel Group* v. *United States*, 751 F.2d 1239 (Fed. Cir. 1985).

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[9] Section 204 states in part:

> The President may, whenever he determines such action appropriate, negotiate with representatives of *foreign governments* in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products, and the President is authorized to issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out any such agreement. *In addition, if a multilateral agreement has been or shall be concluded under the authority of this section among countries accounting for a significant part of world trade in the articles with respect to which the agreement was concluded, the President may also issue, in order to carry out such an agreement, regulations governing the entry or withdrawal from warehouse of the same articles which are the products of countries not parties to the agreement* [emphasis added].

[10] Since 1947 the United States has administered the Northern Mariana Islands as part of the Trust Territory of the Pacific Islands under a United Nations Trusteeship Agreement. Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. Under the Trusteeship Agreement, Art. 3, the United States, as Administering Authority has:

> full powers of administration, legislation, and jurisdiction over the Territory subject to the provisions of this Agreement, and may apply to the Trust Territory, subject to any modifications which the Administering Authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

Article 8, § 4, of the Trusteeship Agreement gave the United States power to negotiate and conclude treaties and agreements with other nations on behalf of the CNMI.

The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, Pub. L. 94-241, 90 Stat. 263, (1976) printed at 48 U.S.C. § 1681, note (1982), was approved by act of Congress on March 24, 1976. Article 1, section 101 of the Covenant, provides: "The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the 'Commonwealth of the Northern Mariana Islands', in political union with and under the sovereignty of the United States of America."

Plaintiff contends that Congress has limited its delegation of authority to the President under section 204 to define products of "countries" for textile restraint purposes to excluding from such restraints products subject to duty-free treatment under General Headnote 3(a). But the Court finds nothing in the legislative history of General Headnote 3(a) or section 204 which requires such an interpretation of these statutes. General Headnote 3(a) provides only for duty-free treatment for products of insular possessions. It is not impermissible for section 12.130(b), defining products for purposes of quantitative restraints on textiles, to affect products imported from insular possessions.

In effect, the country of origin of the merchandise was Korea for textile restraint purposes, and may have been the CNMI for duty and marking purposes.[11] This situation may be awkward, but there is no violation of General Headnote 3(a).

II. The Declaratory Judgment

Plaintiff asks for a declaratory judgment in several paragraphs in its complaint.[12] Plaintiff seems to request that the Court declare *ultra vires* and void (1) section 12.130(b) on its face and as applied (a) to plaintiff's merchandise; (b) to future shipments of plaintiff's merchandise; and (c) to "textile articles from" the CNMI; and (2) the notice of the Chairman of the Committee for the Implementation of Textile Agreements, limiting to 70,000 dozen the number of sweaters that may be imported from the CNMI without application of section 12.130 during the period November 1, 1984 to October 31, 1985.

Plaintiff seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982).[13] The Customs Court Act of 1980, § 301, 28

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[11] Since the merchandise was not entered, it was not assessed a rate of duty.

[12] Plaintiff's complaint does not set forth separate causes of action. Plaintiff requests declaratory relief in the following numbered paragraphs:

14. * * *. Plaintiff seeks a declaratory judgment that 19 CFR § 12.130, as applied to the imported merchandise and to future importations of textile articles from the Commonwealth of the Northern Mariana Islands, is an *ultra vires* Executive Act, contrary to statute, and void.

27. By Notice published at 50 Fed. Reg. 8650–51, March 4, 1985, the Chairman of the Committee for the Implementation of Textile Agreements, purports to permit a quantity of sweaters, not to exceed 70,000 dozen during the period November 1, 1984 through October 31, 1985, to enter the United States without application of 19 CFR 12.130, upon certification of the Government of the Commonwealth of the Northern Mariana Islands, pursuant to section 204, Agricultural Act of 1956, as amended. The provision is termed an "arrangement" and not an agreement.

28. Any arrangement or agreement propounded by the Executive Departments of the United States and the Commonwealth of the Northern Mariana Islands cannot be premised upon section 204, Agricultural Act of 1956, as amended, 7 U.S.C. 1854. Any such arrangement or agreement does not conform to said section and exceeds the power delegated thereby to the Executive by the Congress of the United States. Judgment is sought declaring the law in the premises.

37. 19 CFR 12.130 in so far as it purports to limit the importation of products of the Northern Mariana Islands by criteria not enunciated by the Congress of the United States in General Headnote 3(a), TSUS, in the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, and in the legislation passed by the Congress of the United States in furtherance thereof, is a regulation beyond the power of the Executive to adopt. Judgment is sought declaring any such criteria contrary to law and void.

42. The determination of the country of origin of the imported merchandise upon the basis of 19 CFR 12.130 is contrary to law, since 19 CFR 12.130 is without statutory basis as applied to the insular possessions of the United States, and particularly to the Commonwealth of the Northern Mariana Islands. Judgment is sought declaring said regulation, as amended, adopted, and published on March 5, 1985 at 50 Fed. Reg. 8723–25, contrary to law and unenforceable in these respects.

[13] 28 U.S.C. § 2201 (1982) provides that "[i]n the case of actual controversy within its jurisdiction * * * any court of the United States * * * may declare the rights and other legal relations of any interested party seeking such declaration * * *.

U.S.C. § 2643(c)(1) (1982), creating the Court of International Trade, specifically granted the Court authority to "order any * * * form of relief that is appropriate in a civil action, including * * * declaratory judgments.[14] Although the Court has considered its jurisdiction to issue declaratory judgments under 28 U.S.C. § 1581(h) (1982),[15] *see 718 Fifth Avenue Corp.* v. *United States,* 7 CIT 195 (1984), apparently there has been no judicial opinion discussing the Court's authority to issue declaratory judgments under 28 U.S.C. § 2643(c)(1) or 28 U.S.C. § 2201.

Analyzing the Declaratory Judgment Act, the Supreme Court has been clear that "[t]he requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit * * *. This court is without power to give advisory opinions * * *. It has long been its considered practice not to decide abstract, hypothetical or contingent questions." *Alabama Federation of Labor* v. *McAdory,* 325 U.S. 450, 461 (1945). The Court therefore will examine each issue with respect to which plaintiff requests declaratory judgment to determine whether it presents "a real, substantial controversy between parties having adverse legal interests, [and is] a dispute definite and concrete, not hypothetical or abstract." *Babbit* v. *United Farm Workers National Union,* 442 U.S. 289, 297-98 (1979).

Plaintiff concedes that section 12.130(b) validly regulates products of "countries". The Court has decided that plaintiff's merchandise was lawfully excluded pursuant to section 12.130(b) as a product of Korea. *See* pages 4-15, *supra.* Thus the Court has already held section 12.130(b) valid as applied to plaintiff's merchandise, and, by extension, future shipments of similar merchandise.

Plaintiff also challenges reference in section 12.130(b) to "products * * * of insular possessions" and application of the regulation to "products" of the CNMI.

An action under 19 U.S.C. § 1581(i) may be brought "by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5." 28 U.S.C. § 2631(i) (1982). But plaintiff has not alleged that it is adversely affected or aggrieved by the regulation of products of insular possessions, since plaintiff's merchandise is a product of Korea and not the product of an insular possession. The Court may not issue a declaratory judgment "advising what the law would be on a hypothetical state of facts." *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth,* 300 U.S. 227, 241 (1937).

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[14] The Customs Court lacked power to grant equitable relief, and declaratory judgments sound in equity. *Alberta Gas Chemicals, Inc.* v. *Blumenthal,* 82 Cust. Ct. 77, 88, C.D. 4792, 467 F. Supp. 1245, 1254 (1979).

[15] 19 U.S.C. § 1581(h) provides that the Court

> shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

Plaintiff also lacks standing, on the present record, to challenge the directive of the Chairman of the Committee for the Implementation of Textile Agreements (CITA) to Customs, which permits 70,000 dozen sweaters to be imported from the CNMI without application of section 12.130 during the period November 1, 1984 to October 31, 1985.[16] Nothing in plaintiff's complaint, or in its briefs on the pending motions, alleged any facts to indicate that plaintiff was or would be adversely affected or aggrieved by the CITA directive.[17]

The Court holds that section 12.130(b) is valid as applied to plaintiff's merchandise, and that plaintiff lacks standing to claim that the regulation is invalid as applied to products of the CNMI or to challenge the CITA directive excepting 70,000 dozen sweaters imported from the CNMI.

III. Conclusion

The Court holds that General Headnote 3(a) of the TSUS regulates only duty paid on imports from insular possessions and does not define the country of origin of merchandise imported from insular possessions for all purposes; that plaintiff's merchandise was lawfully excluded pursuant to section 12.130(b) as a product of Korea; and that plaintiff lacks standing to challenge (1) section 12.130 as applied to products of insular possessions and (2) the CITA directive.

Defendant's motion for summary judgment is granted. So ordered.

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[16] Plaintiff challenges the directive on two grounds. First, it says that the Executive, and his delegee CITA, have no authority under section 204, or any other law, to impose quotas on goods imported from insular possessions. Second, plaintiff says that under the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, imports from the CNMI are "subject to the same treatment as imports from Guam", article 603(c), and that since the number of sweaters that may be imported from Guam, without application of section 12,130 during the period is 160,000, the directive limiting CNMI imports is contrary to law.

[17] The Court could consider a motion under Rule 59 of the Rules of this Court if plaintiff shows it is adversely affected or aggrieved by the CITA directive.

ABSTRACTED CLASSIFICAT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HEL
				ITEM NO. AND RATE	ITEM NO RAT
C86/36	DiCarlo, J. March 14, 1986	C.R. Anthony Co.	84-5-00657	Item 700.95 12.5%	Item 700.35 8.5%
C86/37	DiCarlo, J. March 14, 1986	Import Leather, Inc.	80-10-01828	Item 121.59 5%, 2%, or 1%	Item A121.(Free of d
C86/38	DiCarlo, J. March 14, 1986	Matsushita Electric of Puerto Rico, Inc.	82-3-00434	Item 661.30 9.5% for ovens Item 674.35 7.5%	Item 683.95 5% Item 674.10 4.5% Item 678.50 5% Item 664.10 5%
C86/39	Re, C.J. March 17, 1986	Federal Transistor Co.	81-11-01521	Item 678.50 5% and Item 720.14 37.5¢ each + 16%	Item 678.50 5%
C86/40	Re, C.J. March 17, 1986	Industrias La Famosa, Inc.	84-7-01051	Item 182.98 10%	Item 155.75 Free of dut
C86/41	DiCarlo, J. March 17, 1986	Alfa-Laval Inc.	83-3-00328	Item 661.35 4.7% or 4.5%	Item 870.40 Free of d

ICATION DECISIONS

HELD EM NO. AND RATE	BASIS	PORT OF ENTRY AND MERCHANDISE
n 700.35 5%	Agreed statement of facts	Seattle Athletic footwear
n A121.65 ree of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
n 683.95 % n 674.10 5% n 678.50 % n 664.10 %	Agreed statement of facts	San Juan Ovens, die casting machine, etc.
n 678.50 %	Agreed statement of facts	Los Angeles Solid-state digital AM/FM/TV band timekeeping radio/8 track player combinations with LED displays
n 155.75 e of duty	Agreed statement of facts	San Juan Cream of Coconut, product of an eligible beneficiary country
n 870.40 ree of duty	Agreed statement of facts	Detroit Bulk milk coolers and farm tanks

C86/42	DiCarlo, J. March 17, 1986	Hollywood Accessories	84-6-00755	Item 389.62 16¢ per lb. +13% for ratchet tie-downs Item 389.70 8.6% for rubber tie-downs	Item A657 Free of du ratchet t downs Item A774 Free of du rubber t
C86/43	DiCarlo, J. March 17, 1986	Import Leather, Inc.	80-10-01835	Item 121.59 5%, 2%, or 1%	Item A121 Free of du
C86/44	DiCarlo, J. March 19, 1986	Swift Industries, Inc.	78-9-01605	Not stated	Item 708.8 15%

n A657.25 e of duty for atchet tie- owns n A774.55 e of duty for ubber tie-downs	Agreed statement of facts	Los Angeles Ratchet tie-downs and rubber tie-downs
n A121.65 e of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
n 708.80 5%	Judgment on the pleadings	San Francisco Stereo, 81B, etc.

ABSTRACTED VALUATI

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/16	Re, C.J. March 17, 1986	Puma USA, Inc.	83-3-00392	Transaction value	In
V86/17	Re, C.J. March 17, 1986	Puma USA, Inc.	83-3-00393	Transaction value	In
V86/18	Re, C.J. March 17, 1986	Puma USA, Inc.	83-8-01172	Transaction value	In
V86/19	DiCarlo, J. March 17, 1986	De Laval Separator Co.	82-2-00222	Export value	In

LUATION DECISIONS

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Invoiced price paid to Centrotextil of Yugoslavia plus additions for packing and assists	Agreed statement of facts	Los Angeles Basketball shoes
	Invoiced price paid to Centrotextil of Yugoslavia plus additions for packing and assists	Agreed statement of facts	Los Angeles Basketball shoes
	Invoiced price paid to Centrotextil of Yugoslavia plus additions for packing and assists	Agreed statement of facts	Los Angeles Basketball shoes
	Invoice unit values, net packed, shown on commercial invoices with entry papers	Agreed statement of facts	Buffalo Not stated

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